

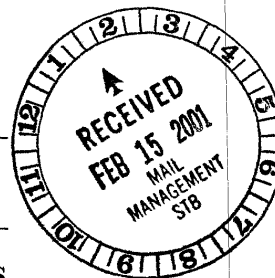
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BEFORE THE
SURFACE TRANSPORTATION BOARD

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EX PARTE NO. 582 (Sub-No. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES



CANADIAN NATIONAL'S NOTICE OF SUPPLEMENTAL AUTHORITY

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February 15, 2001

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A major NAFTA arbitration concerning cross-border investments in land transportation services was decided on February 6, 2001, after CN filed its last comments in this proceeding. CN hereby notifies the Board of the decision, which found that the U.S. was not in compliance with NAFTA when it blocked both Mexican investment in trucking companies operating in the U.S and Mexican provision of trucking services. *See* Final Report, *In the Matter of Cross-Border Trucking Services*, NAFTA Secretariat File No. USA-MEX-98-2008-01 (Feb. 6, 2001) (available at <http://www.ustr.gov/enforcement/trucking.pdf>).

The portion of the *Cross-Border Trucking* opinion dealing with investment is most pertinent to the Board's fashioning of rules concerning major control transactions. *See id.* ¶¶ 279-94 & 297. Mexico argued that the US investment ban was invalid because (among other reasons) "the United States has distinguished between carriers based on the nationality of their ownership or control, denying Mexican owned carriers national treatment (compared to U.S.-owned carriers)" in violation of NAFTA Chapter 11 (entitled "Investment"), Article 1102 ("National Treatment"). *Id.* ¶ 281. The panel agreed, noting that "[t]he United States

has made no significant effort to defend its position on investment on the merits." *Id.* ¶ 287. It found that "no circumstances exist that would justify differential treatment from U.S. (or Canadian) investors and investments under NAFTA's Chapter Eleven national treatment and most-favored-nation obligations." *Id.* ¶ 294.¹

Even with respect to provision of services, regarding which the U.S. asserted a safety concern, the panel found that the U.S. had breached the national treatment obligation of NAFTA Chapter 12 ("Cross-Border Trade in Services"), Article 1202 ("National Treatment"). *Cross-Border Trucking* ¶¶ 241-78. The panel recognized that "the obligation of NAFTA Article 1202 is to provide no less favorable treatment to service providers of" a NAFTA partner than to domestic providers. *Id.* ¶ 254. It found that the US had breached this obligation when it "failed to demonstrate that there are no alternative means of achieving

¹ The panel's recognition within this ruling that "Chapter Nine does not apply to measures affecting investment" (*id.* ¶ 293 (footnote omitted)) stands in contrast to CSX's heavy reliance on Chapter 9 in Section V.B of its rebuttal comments. The panel's opinion also demonstrates that foreign transportation regulations are readily apparent to domestic regulators (*see, e.g., Cross-Border Trucking* ¶ 245), in contrast to the position taken in this proceeding by DOT (*see, e.g., DOT Reply Comments*, at 9).

U.S. safety goals that are more consistent with NAFTA requirements than the moratorium”
that prohibited Mexican provision of trucking services in the U.S. *Id.* ¶ 270.²

Respectfully submitted,



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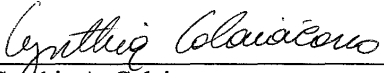
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² Moreover, in this services context, the panel recognized that Chapter 9 not only does not override the national treatment obligation of Article 1202, but explicitly requires national treatment conformance. *Cross-Border Trucking* ¶ 272 & n.309.

CERTIFICATE OF SERVICE

I certify that I have this 15th day of February, 2001, served copies of the foregoing Canadian National's Notice of Supplemental Authority upon all known parties of record in this proceeding by first-class mail or a more expeditious method of delivery.


Cynthia A. Colaiacovo